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LENSCRAFTERS, INC., EYEXAM OF
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9
10 IN THE UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 LENCRAFTERS, INC.; EYEXAM OF
13 CALIFORNIA, INC.; and EYEMED VISION
CARE, LLC,

14 Plaintiffs,

15 v.

16 LIBERTY MUTUAL FIRE INSURANCE
17 COMPANY and EXECUTIVE RISK SPECIALTY
18 INSURANCE COMPANY,

19 Defendants,

20 AND RELATED COUNTER- AND CROSS-
21 CLAIMS.

Case No.: CV-04-01001 SBA

**PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED**

[LOCAL RULE 3-12(b)]

1 Plaintiffs respectfully request that the Court consider this brief reply memorandum in
2 support of their administrative motion to deem Case No. C-07-2853 EMC, filed by LensCrafters,
3 Inc. and EYEXAM of California, Inc. on May 31, 2007 (the “Second LensCrafters Action”), a
4 “related case,” within the meaning of Local Rule 3-12(a). We recognize that the Local Rules do not
5 appear to contemplate the filing of a reply in most circumstances, but in this instance defendant
6 United States Fire Insurance Company (“U.S. Fire”) — the only defendant opposing plaintiffs’
7 motion — has filed an opposition that contains several misstatements of fact. Plaintiffs believe that
8 these facts should be corrected now, so that the Court can make its determination whether the cases
9 are related based on an accurate and complete record.

10 First, U.S. Fire claims that plaintiffs have tried to make the first and second coverage cases
11 in this Court appear more related than they are by intentionally and improperly omitting from the
12 coverage suit five LensCrafters-related entities that U.S. Fire claims are defendants in the
13 underlying *Snow* litigation. U.S. Fire’s assertion that there should be 12 parties in the Second
14 LensCrafters’ Action — which is made to suggest that there is less overlap of the parties to both
15 actions than there really is — is simply wrong. In fact, the five other LensCrafters-related entities
16 were dismissed as defendants in *Snow* and therefore have no claims for indemnity arising out of the
17 *Snow* action. EyeMed Vision Care, LLC — which was named as a plaintiff in this action, but not in
18 the Second LensCrafters Action — has also been dismissed from *Snow*. Thus, the Second
19 LensCrafters Action properly names as plaintiffs only those entities who have a dispute with U.S.
20 Fire and the other defendants regarding claims for indemnity in *Snow*, and every plaintiff in the
21 Second LensCrafters Action was a plaintiff in the First LensCrafters Action.

22 Second, U.S. Fire argues that this action and the Second LensCrafters Action do not arise
23 from the same transaction or events. In fact, both actions arise from the underlying *Snow* action
24 and the events that led to its filing — that is, the business model used by LensCrafters in
25 California, and the transactions between LensCrafters and the purported class members that
26 allegedly violated California’s medical privacy statute. Simply because there is a different legal
27 standard for the duty to defend than for the duty to indemnify does not mean that the actions arise
28 from different transactions. Moreover, at least one of the summary judgment motions decided by

1 this Court in the First LensCrafters Action directly relates to the duty to indemnify issues that will
2 arise in the second action. In the Court's October 5, 2005 Order (Ex. 3 to the Jackson Dec.), the
3 Court found that the ERSIC policy was excess to the Liberty policy, and therefore ERSIC did not
4 have a duty to defend. This ruling implicates the order of exhaustion of policies for purposes of
5 indemnity. Thus, it would be a duplication of judicial effort to have a different judge consider this
6 same issue, just as it would be a duplication of judicial effort for a different judge to analyze the
7 same policies and insurance coverage law that this Court has already analyzed.

8 Finally, U.S. Fire claims that the First LensCrafters Action involved only two of the 17
9 relevant insurance policies. Opp. at 4:5-7. In fact, this action involved seven insurance policies,
10 not two — six issued by Liberty Mutual Fire Insurance Company and one issued by ERSIC. All of
11 these policies are also at issue in the Second LensCrafters Action. While the Second LensCrafters
12 Action includes a number of additional policies, all of them are excess policies that contain insuring
13 agreements and other provisions that are largely identical to the language in the Liberty Mutual
14 policies that the Court examined in detail and interpreted in its January 20, 2005 summary
15 judgment Order.

16 Finally, as U.S. Fire states in its opposition, it has filed a declaratory relief action in the
17 State of New York against plaintiffs regarding the duty to indemnify for the *Snow* action. Plaintiffs
18 believe that New York is an inappropriate forum, and plan to litigate that issue at the appropriate
19 time.

20 DATED: June 14, 2007

Respectfully submitted,

HELLER EHRMAN LLP

23 By /s/ Celia M. Jackson
24 Celia M. Jackson

25 Attorneys for Plaintiffs
26 LENS CRAFTERS, INC., EYEXAM OF CALIFORNIA,
27 INC., AND EYEMED VISION CARE, LLC
28

1 **PROOF OF SERVICE**

2 I, Michael Ewers, declare that I am over the age of eighteen years and I am not a
3 party to this action. My business address is 333 Bush Street, San Francisco, California 94104-
2878.

4 On June 14, 2007, I served the following document(s):

5 **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF**
6 **ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES**
7 **SHOULD BE RELATED AND REQUEST FOR LEAVE TO FILE SAME**

8 on the interested parties in this action by placing true and correct copies thereof, enclosed in sealed
envelopes addressed as follows:

9 **SEE ATTACHED SERVICE LIST**

10 [] **BY MAIL:** I am readily familiar with the business' practice for collection and processing
11 correspondence for mailing with the United States Postal Service. I know that the
12 correspondence was deposited with the United States Postal Service on the same day this
13 declaration was executed in the ordinary course of business. I know that the envelopes were
sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date,
following ordinary business practices, in the United States mail at San Francisco, California.

14 [X] **BY FACSIMILE TRANSMISSION:** I transmitted such documents by facsimile as
15 indicated on the attached service list.

16 [X] **BY HAND DELIVERY:** I caused the document(s) to be delivered by hand as indicated on
17 the attached service list.

18 [X] **BY OVERNIGHT DELIVERY:** I caused such envelopes to be delivered to the above
19 parties on the following business day by FEDERAL EXPRESS service as indicated on the
attached service list.

20 I declare under penalty of perjury under the laws of the State of California that the foregoing
21 is true and correct, that this declaration is executed on June 14, 2007, at San Francisco, California;
22 and that I am employed in the office of a member of the bar of this Court at whose direction the
service was made.

23 /s/ Michael Ewers

24 **Michael Ewers**

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